Supreme Court, U.S.
FILED

96 873 SEP 27 1996

No. [redacted]

In the

Supreme Court of the United States

OCTOBER TERM, 1996

APOSTOLOS TSIMBIDAROS
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AND PAINTERS LOCAL UNION 1719
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit.

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

The petitioner, Apostolos Tsimbidaros, pursuant to Supreme Court Rule 10, respectfully requests that the Honorable United States Supreme Court grant a WRIT OF CERTIORARI in order to: 1) correct the errors of the lower federal courts; and 2) align the lower federal courts in accordance with the text and spirit of the Americans with Disabilities Act. The questions presented here are:

1) The Petitioner, a disabled senior citizen, suffered severe disabilities in an accident incurred while the lawsuit was pending. Even though the Respondents subjected the Petitioner once before to a deposition, the Respondents scheduled a second deposition an hour and a half away from the Petitioner's home during the worst month of the New England winter, only several weeks after the Petitioner underwent a traumatic surgery. The Petitioner sought "reasonable modifications" in accordance with the Americans with Disabilities Act and with Rule 30(b) of the Rules of Federal Civil Procedure. The District Court failed to ensure reasonable modifications, to postpone the deposition to a later date, and to provide an alternative method of deposition.

The District Court granted the Respondents Motion to Dismiss based on the Petitioner's nonappearance at the second deposition. Did the District Court err, in defiance and contradiction of Rule 30(b) and the Americans with Disabilities Act, when it granted the Defendant's Motion to Dismiss?

2) According to 28 U.S.C. § 455(a), a judge or magistrate must disqualify himself or herself in any proceeding in which his or her impartiality

may reasonably be questioned. The rulings of Judge Daly, the District Court judge who dismissed the suit, and Magistrate Thomas P. Smith, the magistrate Judge Daly assigned all pre-trial procedures, exhibited a pro-union bias. For example, the District Court prohibited the Petitioner from bringing to light possible RICO violations committed by unions, baselessly dismissed the case brought by the disabled Petitioner against two powerful unions, sanctioned violations of the Americans with Disabilities Act and the Rules of Federal Civil Procedures, and allowed these unions to continue their discriminatory practices. Did the District Court commit error when it failed to provide an impartial adjudicator considering these rulings and considering that the Magistrate was a card-carrying member and supporter of a union? Did the lower court err when it failed to appoint an impartial judge?

3) It is well established that a court may impose costs "reasonably" incurred by a party against the other. A court may not force a party to be responsible for the unreasonable costs of the other party. Several weeks before a January 26, 1996 scheduled deposition, the Petitioner notified the Respondents and the District Court that he was physically incapacitated and unable to attend a deposition an hour and a half away from his home in the middle of January while he was on pain killers. The Respondent Attorney McCarry wrote a letter several days before the deposition seeking punishment for the Petitioner's certain nonappearance. Did the District Court err when it awarded the costs incurred by Respondent Attorney Barbara Camens when she purchased a round-trip ticket from Washington, D.C. to Connecticut several weeks after she obtained the knowledge of

the Petitioner's nonappearance?

4) The Petitioner filed a lawsuit against two unions. The Petitioner was a member of both unions and in need of employment. The Respondents refused to hire the Petitioner as well as other disabled workers for federally funded projects. In addition, the Respondents may have violated the RICO statute, 28 U.S.C. § 1331. Yet, the District Court killed the lawsuit. Should the United States Supreme Court review a case of national importance as the rights of the disabled are trampled upon by organized labor as sanctioned by a District Court?

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STATUTES INVOLVED IN THIS CASE

Title VII, Civil Rights Act of 1964, Sec. 2000e-26-703(c).

Americans with Disability Act of 1990, 42 U.S.C. 12102, §§ 3602(n), 3604(c).

American with Disabilities Act, Title II, 28 CFR 35.149, 35.150, II-5. 1000, provides a standard known as "program accessibility" which applies to all existing facilities and services of a public entity:

> "A public entity may not deny the benefits of its programs, activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities."

Rehabilitation Act of 1973, 29 U.S.C. §§ 706-795(i).

Executive Order 12201.

Regulatory Flexibility Act.

29 CFR 1604.6 (Equal Protection under the law).

Federal Whistle Blower Act, U.S.C. §§2021-2024 (1988), as amended on March 18, 1991.

Civil Rights Act of 1866 (Equal Rights under the law).

29 CFR 1604.6(a) (Internal segregation within an agency is illegal and unlawful).

Federal Register § 36.104, Pg. 35594

provides:

"Place of Public Accommodations means a facility, operated by a private entity whose operations affects commerce and falls within one of the following categories:
...6) A Laundromat, dry-cleaning, bank, barber beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or **lawyer....**" (Emphasis added).

Federal Register § 36.201, Pg. 35595 provides:

"No individual shall be discriminated against on the basis of disability in the full and equal employment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations by any private entity who owns, leases (or leases to) or operates a place with public accommodations."

Federal Register § 36.302, Pg. 35596 provides:

"A public accommodation shall make reasonable modification in policies, practice or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities unless, the public accommodation can demonstrate that making the modification would fundamentally alter the nature of

goods, services, facilities, privileges or accommodations."

Federal Register § 36.303, Pg. 35597 provides:

"A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than any other individual because of the absence of Auxiliary Aids and Services." (also 28 CFR 39.103).

Federal Register § 36.305, Pg. 35596 provides:

"Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make goods, services, facilities, privileges or accommodation available through alternative methods is these methods are readily achievable:

a) Providing curb or home delivery;

b) Retrieving merchandise from inaccessible shelves or racks;

c) Relocating activities to accessible locations."

The Regulatory References to 28 CFR 35.106-35.164, Title II-7, 1000 provides:

"Equally effective Communications with individuals with disabilities are as effective as communications with others."

STATEMENT OF THE CASE

In June of 1992, this Honorable Court issued a decision which expressly granted the right of union members to sue their unions when these unions violate union by-laws. The Petitioner had several disabilities at the time.

The Petitioner's unions, Local 1719 and its International union, the Respondents, violated their by-laws. The Respondents refused to hire the Petitioner as well as other disabled workers for federally funded projects in violation of the Americans with Disabilities Act. In addition, the Respondents may have violated the RICO statute. The Petitioner brought suit against his unions in the United States District Court, District of Connecticut at Bridgeport.

The Petitioner is an immigrant house painter He is uneducated in the English language. As such, he is unfamiliar and unknowledgeable with the legal maneuvering and avoidance tactics practiced by the Respondents.

The District Court accepted the Petitioner's Complaint as valid.

On August 15, 1993, the Respondent's deposed the Petitioner in Bridgeport, Connecticut. The Petitioner gave the Respondent's an opportunity to ask as many questions as necessary. The Respondent Attorneys brought the four hundred pound General Representative of Local 1719 painter to the deposition. This painter physically and verbally abused and intimidated the Petitioner. The deposition lasted a short time as the Respondents and their bully attempted to scare the Petitioner to break his spirit.

The Petitioner pursued the case up to the discovery stage when a tragedy occurred.

On May 3, 1993, the Petitioner was involved in a serious accident. The Petitioner's injuries

were numerous and complicated. For example, both arms were severely injured. The injuries were so severe that the Petitioner's physician placed the Petitioner's left arm in a cast/splint on four different occasions. This physiciar prescribed 500 mg. of a pain killer, Naprosyn, to alleviate pain in conjunction with Diabeta, a medication to combat the Petitioner's diabetes.

The Petitioner, according to his physician orders, was completely incapacitated for eight months following the accident. From June of 1994 through December of 1995, the Petitioner underwent three major surgeries, all of which required general anesthesia.

Rather than reasonably accommodate the Petitioner, the Respondent's clogged the lower courts with unnecessary paperwork and motions. While the Petitioner was at home recuperating, representatives from the Respondent's trespassed on his property, barged into his mail box, and rearranged mail belonging to him.

In December of 1995, the Petitioner endured his third and most serious surgery of the year. Rather than allow the Petitioner to recuperate, the Respondents sought the death of his lawsuit and possible further injuries to the Petitioner. The Respondents sought to depose the Petitioner while his arm was in a heavy cast and while he ingested medication. The proposed site was illogical; it was an hour and a half away from the court the case was pending; an hour and a half further north from one of the Respondent attorneys, Barbara Camens, and an hour and half from the home of the Petitioner in the worst month of the New England winter.

In December 1995, the Respondents sent notice of the second deposition scheduled for January 26, 1996. The Petitioner immediately reminded the Respondents and the District Court that he was

under physician's care, under the influence of prescribed mind altering pain killers, recuperating from major surgery, unable to travel an hour and a half in winter, and in great pain.

The Petitioner filed motions to the District Court requesting a deposition :1) in the most reasonable location, 2) on another date so as the Petitioner could recuperate and so the weather could cooperate, and/or 3) with alternative means as provided by the Federal Rules of Civil Procedure.

Instead of mitigating damages, the Respondent Attorney Barbara Camens purchased a round-trip ticket from Washington, D.C. to Connecticut. Thus, the Respondents inflated the costs. In a letter dated January 26, 1995, Respondent Attorney David McCarry sent a letter to Judge Daly, Attorney McCarry admitted that the Petitioner gave ample notice of his nonappearance.

Nonetheless, United States Magistrate Thomas P. Smith, a card carrying member and supporter of a union, dismissed the suit and awarded the Respondents inflated legal fees in the amount of $2,344.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT SANCTIONED VIOLATIONS OF THE TEXT AND SPIRIT OF THE AMERICANS WITH DISABILITIES ACT WHEN IT DISMISSED THE PETITIONER'S LAWSUIT

The Americans with Disabilities Act protects persons with disabilities. 28 CFR 35.102, Fed. Reg. No. 144, Pg. 35696 (7-26-91). Specifically, the Americans with Disabilities Act mandates that an attorney must provide reasonable accommodations when dealing with other people and when providing access to a law office. 28 CFR 36.104.

The protection of the Americans with Disabilities Act extends to access to and procedural rules of all federal courts. The ADA is an umbrella providing broad protection, when applied to the federal courts, which protects persons with disabilities from all services, programs, activities, and procedures of federal courts. 28 CFR 35.130(b)(7).

The Federal Rules of Civil Procedure authorize the District Court to provide reasonable accommodations on an individual basis, when cause is demonstrated. Rule 30(c)(4) specifically allows other means of taking a deposition. The Petitioner fully disclosed the nature of his disabilities to the District Court. The Petitioner underwent a deposition. The Respondents sought a second, unnecessary deposition after while the Petitioner recuperated from numerous traumatic injuries.

The Respondents, informed of the Petitioner's incapacities, decided to schedule the deposition an hour and a half away from the Petitioner's home in the middle of January in direct contrivance of Rule 30 of the Federal Rules of Civil Procedure. Rule 30 states that a deposition must take place wherever a suit is filed. The suit was pending in Bridgeport, the city where the Petitioner lived, not in Hartford, the site the Respondents scheduled the deposition.

The District Court also sanctioned a violation of Rule 26 of the Rules of Federal Civil Procedure which states that two parties of a suit **together** schedule a **mutually convenient** time and place for a deposition. The Respondents single-handedly, along with the District Court's approval, set the time and place of the deposition.

The timing of this second deposition, just a few weeks after the Petitioner underwent serious,

traumatic surgery, is extremely suspect. It seemed that the Respondents were "kicking a person while down." As such, the Petitioner, through motions, sought a postponement. When the District Court denied these motions, the Petitioner wrote a letter seeking reasonable accomodations directly to the judge assigned to the case.

Judge Daly was not faced with a dilemma of the proportion faced by Hamlet. Rather, the dilemma was easy: either postpone the deposition to the Spring (or provide an alternative means of deposition) or dismiss a lawsuit with serious ramifications to organized unions and to constitutional rights.

If the Petitioner were a person who was blind or hearing impaired, the attorneys for the union would have been obligated to accommodate his disabilities at a deposition by providing Auxiliary Aids and Services (e.g., interpreters, readers, etc.) so as to prevent discrimination based on a disability. 28 CFR 36.303(a) and (b). Further, the attorneys for the Respondents would have to remove architectural barriers or utilize reasonable alternatives in order to depose a litigant.

The Petitioner requested a reasonable modification of the Respondent attorneys to participate in the deposition in a manner consistent with the Petitioner's physical limitations in accordance with 28 CFR 36.302. In addition, the Petitioner pleaded with the District Court to provide an alternative form of deposition or at the least, a postponement to a latter date or relocation to a site closer to the Petitioner's home. The District Court refused.

In doing so, the District Court promoted discrimination in violation of 28 CFR 36.302(a). Often, discrimination against people with mental or physical disabilities is the product, not of

invidious animus, but rather of thoughtfulness and indifference of benign neglect; discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus. Alexander v. Choate, 469 U.S. 287, 295-97 (1985).

The District Court dismissed the Petitioner's case because a sick and incapacitated senior citizen could not attend a deposition one and a half hours away from his home in the statistically worst month, in terms of driving condition, of the year. The District Court refused to order any reasonable accommodations.

The attorneys for the Respondents did not claim that a burdensome alteration would occur if the deposition took place in Bridgeport, where the Petitioner lived. The District Court, in effect, found that it would be more burdensome for able-bodied attorneys to travel an hour and a half than it would be for a handicapped person on medication to travel an hour and a half in the middle of winter.

The District Court abused its discretion by sanctioning the totally incapacitated Petitioner to a "suicide mission." The lower court gave the Respondents the "green light" to a corrupted union to continue to do as it pleases, to continue to rob its members and to continue to denigrate the spirit of the American with Disabilities Act, not to mention the United States Constitution.

II. THE DECISIONS OF THE DISTRICT COURT COMBINED WITH THE PRO-UNION BACKGROUND OF THE UNITED STATES MAGISTRATE WHO HEARD THE CASE PIERCE AND REASONABLY QUESTIONED HIS IMPARTIALITY. AS A RESULT, HIS REMOVAL WAS NECESSARY TO PROVIDE THE PETITIONER WITH AN IMPARTIAL ADJUDICATOR

According to 28 U.S.C. § 455(a), a judge or magistrate must disqualify himself or herself in any proceeding in which his or her impartiality may reasonably be questioned. Likewise, the Rules of Judicial Conduct mandate that a judge must step down at the "appearance" of bias or prejudice. Otherwise, a judge or magistrate commits error when he or she continues to sit on a case. The standard for removal is the "appearance" or "questioning" of bias, prejudice, or impartiality.

It is clear from the record that the District Court judge and United States Magistrate Thomas P. Smith should have removed themselves. According to the record, United States Magistrate Thomas P. Smith failed the standard. This conclusion is reached by looking at his decisions and background, both of which are pro-union.

The decisions reached by the District Court over the course of the suit clearly exhibit pro-union favoritism. For example, failed to adhere to Rule 32(a)(3) of the Rules of Federal Civil Procedure when he dismissed the lawsuit. This rule seeks to protect the dismissal of a suit when "exceptional circumstances" and "hardship," like an accident or disabilities arise.

In addition, the appearance of animus occurred when Magistrate Thomas P. Smith sanctioned a violation by the Respondents of Rule 3.4(a) of the Model Rules of Evidence. This rule provides that a lawyer may not unlawfully obstruct another party's access of evidence or alter,

destroy or conceal a document or material having potential evidentiary value. At the first deposition of the Petitioner, the Petitioner gave the Respondents originals of documents which they had requested. The Respondents did not return all of these documents. Magistrate Thomas P. Smith failed to sanction the Respondents despite the Petitioner's pleas; instead, Magistrate Smith did nothing.

Another pro-union motivated decision resulted in the District Court striking out a portion of the Petitioner's complaint. The Petitioner had evidence which indicated that the Respondents violated 28 U.S.C. § 1331, the so called "RICO" statute. This evidence would have brought to light to the public that the Respondents had histories of misrepresenting their members, histories of corruption, histories of illegal collusion with contractors, and histories of possible organized crime ties. Magistrate Thomas P. Smith prevented this evidence from coming to light by striking the portion from the Complaint.

Not only were his decisions suspect, but Magistrate Thomas P. Smith's background also indicated union-favoritism. He was an admitted card-carrying member of a union. He did not disavow any union favoritism. Combined with the biased rulings, Magistrate Smith failed the standard; his impartiality went beyond the mere appearance of impartiality. It appeared both real and unreasonable

III. THE DISTRICT COURT ERRED WHEN IT GRANTED COSTS TO THE RESPONDENTS AFTER THE RESPONDENTS ESCALATED THE COSTS OF A DEPOSITION THAT THE PETITIONER GAVE ADVANCED NOTICE OF HIS PHYSICAL INABILITY TO ATTEND

It is well established that a court may impose costs "reasonably" incurred by a party against the other. A court may not force a party to be responsible for the unreasonable costs of the opposing party.

The Respondents deposed the Petitioner on August 15, 1993 in Bridgeport, the city the Petitioner resided in. Even though the petitioner's left arm was in a cast, he answered all questions the Respondents asked. In December of 1995, the Petitioner underwent a serious surgical procedure. The Respondents sought to depose the Petitioner a few weeks later on January 26, 1996.

In December of 1995, the Petitioner gave advance notice that he would not be able to attend the deposition. The Petitioner filed motions notifying the District Court that he was physically unable to attend the deposition as scheduled unless reasonable accommodations were made.

The District Court denied these motions before the scheduled date of deposition. As soon as the Petitioner received notice of the District Courts denial, the Petitioner contacted Respondent Attorney David McCarry and reminded him once again that the Petitioner would not be physically able to attend the deposition. The Petitioner, as he did weeks before, instructed the Respondent to call the court reporter and the other attorneys so as no unnecessary costs would be incurred.

Possibly smelling blood and money, the Respondent Attorney David McCarry failed to cancel

or reschedule the deposition. Instead, he ordered that attorney Barbara Cemens purchase a round-trip plane ticket from Washington, D.C. to Connecticut, and that she take a taxi to and from the airport. In an attempt to inflate the costs more, Respondent Attorney David McCarry ordered the court reporter to arrive anyway. The alleged costs were $2,344. The impression is obvious: two rich unions gave one of their high-priced attorneys a vacation to Connecticut on the tab of a disabled, senior citizen, laborer. And worse, Magistrate Smith sanctioned this.

Judge Daly awarded costs in the amount of $2,344, the amount Attorney McCarry submitted for the deposition. These costs are unreasonable. The Petitioner gave the Respondents several weeks notice that he would not attend the deposition as scheduled. Yet, a high-priced attorney flew to Connecticut and then back to Washington, D.C. What could possibly be "reasonable" about that?

IV. THE UNITED STATES SUPREME COURT SHOULD ALLOW THE PETITIONER'S CASE TO CONTINUE BECAUSE THE CASE INVOLVES ISSUES OF NATIONAL IMPORTANCE AFFECTING THE CONSTITUTIONAL RIGHTS OF PERSONS WITH DISABILITIES AND MEMBERS OF UNIONS

On June 12, 1992, the Petitioner filed his lawsuit against the Respondents, the Petitioner's local union and international union. These two labor organizations deprived the Petitioner of employment and various constitutional rights. The amount of relief the Petitioner sought was $2,000,000.

Local 1719 enforced an "out-of-work" list also known as an "unemployed" list. The Petitioner had evidence that Local 1719 constantly placed the Petitioner's name on the "out-of-work" list.

Further evidence indicates that this union had almost full employment as work was plentiful. A majority of the work involved state and federal contracts.

State and federal law requires that unions ensure that government funded projects include the hiring of people with disabilities. Rather than follow the law, Local 1719 failed to hire the legal proportionate number of people with disabilities. In addition, the Respondents failed to ensure reasonable accommodations as required by the Americans with Disabilities Act. Instead, the members of the board of Local 1719 gave the work to their friends who worked below union scale. The disabled and other union members remained starving on the "out-of-work" list.

At this time, the Petitioner paid his full union dues and assessments.

Section 10(1) of Local 1719's By-Laws state that "any job placement will be through the Business Representative." Section 211 of International Union's Constitution states that

> "out of town painting contractors performing work in the jurisdiction of painter Local 1719 will employ 75 percent from the local residents and 25 percent from the contractors home office."

Evidence clearly shows that Local 1719 and the International allowed out of town contractors to complete massive projects, funded by the Department of Housing and Urban Development and other federal agencies, without hiring persons with disabilities and without making reasonable accommodations Instead of following the law, the Business Representative hired his able-bodied friends, many of whom worked below union scale wages.

The Court of Appeals, Second Circuit, denied

the Petitioner's appeal. In addition, the appeals court denied the Petitioner's Petition for Rehearing.

It is well established that the Supreme Court will not grant certiorari to "review evidence and discuss specific facts." United States v. Doe, 465 U.S. 605, 614 (1984). The Supreme Court can accept a petition for Writ of Certiorari when the case presents extraordinary circumstances. U.S. v. Boch Oldsmobile Inc., 909 F.2d 657, 660 (1st Cir. 1990). In addition, the Supreme Court can reverse the final judgments of a lower courts when a manifest abuse of discretion occurs. Id. The errors committed by the lower courts and the issues of this suit concern issues of national importance. The rights of the disabled and handicapped Americans have been violated. This Honorable United States Supreme Court can stop this.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Apostolos Tsimbidaros

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****These items prove that the Respondents and the Respondents Attorneys were fully aware and informed that the Petitioner was a person with severe disabilities prior to his May 3, 1993 accident.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

APOSTOLOS TSIMBIDAROS	:	
v.	:	CASE NO. 5:92CV-345(AWT)
INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, ET AL	:	

JUDGMENT

This action having come on for consideration of the defendants' joint motion to dismiss before the Honorable Thomas P. Smith, United States Magistrate Judge, and the Honorable Alvin W. Thompson, United States District Judge and,

The Honorable Thomas P. Smith having considered the motion and the full record of the case including applicable principles of law, and having filed a Recommended Ruling on Defendants' Joint Motion for Dismissal With Prejudice granting the motion and the Court having Accepted it on September 7, 1995, it is hereby

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered in favor of the defendants and costs and attorneys' fees are awarded to the defendants in the amount of $2,344.00.

Dated at Hartford, Connecticut, this 15th day of September, 1995.

KEVIN F. ROWE, Clerk

By_____
Robin D. Tabora

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

APOSTOLOS TSIMBIDAROS	:	
v.	:	CASE NO. 5:92CV-345(AWT)
INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, ET AL	:	

ENDORSEMENT ORDER

Upon review and pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 2 of the Local Rules for United States Magistrate (D.Conn.), Magistrate Judge Smith's Recommended Ruling on Defendant's Joint Motion for Dismissal with Prejudice [Doc. #220] is ACCEPTED.

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of September, 1995.

Alvin W. Thompson
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APOSTOLOS TSIMBIDAROS,
Plaintiff-Appellant

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, PAINTERS LOCAL UNION 1719;
PAUL CHROMANSKI, Business Manager;
MARK ARMENTANO; President;
INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES,
Defendants-Appellees

No. 95-9040

SUMMARY ORDER

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut (Thompson, D.J.), and was argued by the appellant and submitted by the appellees.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Plaintiff-appellant Apostolos Tsimbidaros, who is proceeding pro se, appeals from a judgment of the district court dismissing his complaint with prejudice pursuant to Fed. R. Civ. P. 37(b)(2)(C), as a sanction for his failure to comply with discovery orders. Tsimbidaros brought this action for damages against International Brotherhood of Painters and Allied Trades and the

Painters Local Union 1719.[1] Plaintiff's second amended complaint alleges, inter alia, that the defendants violated their bylaws by 1) intentionally keeping Tsimbidaros on the "unemployed list" and giving work which was due him to other union members, and 2) allowing out-of-state contractors to complete jobs without hiring the requisite percentage of local workers.

At the outset of Tsimbidaros's first deposition, held on August 19, 1993, Tsimbidaros testified that he was under the influence of certain medication, and consequently would not be bound by his testimony. On September 16, 1993, defendants filed no responses or objections to their requests for interrogatories to clarify the claims in his complaint, had responded only in part to their requests for production of documents, and had refused to be deposed.

On October 12, 1993, the district court ordered Tsimbidaros to respond, within twenty days, both to defendants' interrogatories and to their request for documents, and to submit to a deposition within thirty days thereafter. The district court also specifically advised that "the continued violation of his discovery obligations will result in the imposition of sanctions, including attorneys' fees and/or dismissal with prejudice of this lawsuit." On January 10, 1994, Tsimbidaros complied by answering the defendants' interrogatories. In late 1994, twice moved for a stay to surgery.

On January 26, 1995, Tsimbidaros failed to attend his second deposition without notifying the defendants, despite the fact that the defendants' letter advising him of the time and place

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[1] Tsimbidaros's original complaint included three individual defendants who were not included in the amended complaint.

instructed him to provide advance written notice if he was unable to attend. On February 3, 1995, the defendants filed a joint motion to dismiss Tsimbidaros' complaint with prejudice pursuant to Fed. R. Civ. P. 37(b)(2)(C). On April 7, 1995, the magistrate judge found that, despite the court's several warnings, Tsimbidaros had refused to comply with discovery orders, delaying his case for nearly eighteen months. Accepting the recommendation of the magistrate judge, the district court granted the defendants' motion and awarded the defendants attorneys' fees in the amount of $2,344. On October 5, 1995, Tsimbidaros timely filed a notice of appeal.

A district court's decision to dismiss an action for failure to comply with discovery orders will be reversed only if the decision is an abuse of discretion. John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988). the imposition of sanctions pursuant to Fed. R. Civ. P. 37 is within the broad discretion of the district court. Minotti v. Lensink, 895 F.2d 100, 102 (2d Cir. 1990). Dismissal with prejudice is a harsh remedy that should be used only where the court finds willfulness, bad faith, or fault by the prospective deponent. Valentine v. Museum of Modern Art, 29 F.3d 47, 49-50 (2d Cir. 1994) (citing Bobal v. Rensselear Polytechnic Institute, 916 F.2d 759, 764 (2d Cir. 1990), cert. denied, 499 U.S. 943 (1991). Nonetheless, this severe sanction may be imposed even on a pro se plaintiff where the litigant adequately has been warned that noncompliance may result in dismissal. Id. at 50.

Because the district court adequately warned Tsimbidaros of the possible consequences of noncompliance with the discovery orders, the district court did not abuse its discretion.

Tsimbidaros' contention that the surgeries performed on his arm may have prevented him from complying with the magistrate judge's deadlines for responding to interrogatories and requests for documents is unavailing, as both of the surgeries took place after the deadlines had expired. Moreover, although Tsimbidaros appeared at his first deposition, he rendered it a meaningless exercise by stating that his medication rendered him incapacitated. Second, Tsimbidaros failed to show up at the second deposition without notice, and he has failed to offer credible reasons either for his failure to appear or for his failure to give notice.

The award of damages was also not an abuse of discretion. Rule 37(b)(2) requires "the party failing to obey the order...to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that the circumstances make the award of expenses unjust." In this case, Tsimbidaros has not shown that he is indigent or put forth any other reason which would make awarding expenses unjust.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

Hon. James L. Oakes, U.S.C.J.

Hon. Frank X. Altimari, U.S.C.J.

Hon. John M. Walker, Jr., U.S.C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifteenth day of August one thousand nine hundred and ninety-six.

Present:

Hon. James L. Oakes
Hon. Francis X. Altimari
Hon. John M. Walker, Jr.

TSIMBIDAROS

Appellant

v.

IBP LOCAL 1719

Appellee

A petition for rehearing having been filed herein by Apostolos Tsimbidaros.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

GEORGE LANGE III, Clerk

By_____
Kathleen Brouwer
Operations Manager

Social Security Administration
Retirement, Survivors and Disability Insurance
Notice of Award

C93096

Northeastern Program Service Center
155-10 Jamaica Avenue
Jamaica, New York 11432-3830

APOSTOLOS TSIMBIDAROS
72 WHITTIER ST
BRIDGEPORT CT 06605

Date: April 11, 1993
Claim Number: 045-50-9044 HA

We are writing to let you know that you are entitled to monthly disability benefits from Social Security beginning January 1992.

The amount of your first check is $ 9556.00.

Shortly after April 06, 1993, you will receive your first payment which will include all benefits due you through March 1993. A payment for $651.00 will be sent on or about May 03, 1993. After that, a payment for $651.00 will be sent each month.

The following chart shows your benefit amount(s) before any deductions or rounding. The amount you actually receive may differ from your full benefit amount. When we figure how much to pay you, we must deduct certain amounts, such as Medicare premiums and worker's compensation offset. We must also round down to the nearest dollar.

Beginning Date	Benefit Amount	Reason
January 1992	$ 632.30	Entitlement began
December 1992	$ 651.20	Cost-of-Living adjustment

Doctors and other trained staff decided that you are disabled under our rules. But, this decision must be reviewed at least once every 3 years. We will send you a letter before we start the review. Based on that review, your benefits will continue if you are still disabled, but will end if you are no longer disabled.

The benefit described in this letter is the only one you can receive from Social Security. If you think you may qualify for another kind of Social Security benefit in the future, you will have to file another application.

The decisions we made on your claim are based on information you gave us. If this information changes, it could affect your benefits. For this reason, it is important that you report changes to us right away.

We have enclosed a pamphlet, "When You Get Social Security Disability

SSA-L30
C

Benefits...What You Need To Know." It will tell you what must be reported and how to report. Please be sure to read the parts of the pamphlet which explain what to do if you go to work or if your health improves.

If you think we are wrong, you have the right to appeal. A person who did not make the first decision will decide your case. We will correct any mistakes. We will review those parts of the decision which you believe are wrong and will look at any new facts you have. We may also review those parts which you believe are correct and may make them unfavorable or less favorable to you.

- You have 60 days to ask for an appeal.
- The 60 days start the day after you receive this letter.
- You must have a good reason if you wait more than 60 days to ask for an appeal.

You can have a friend, lawyer or someone else help you. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your appeal. Your local Social Security office has a list of groups that can help you with your appeal.

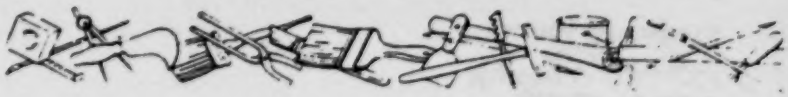
If you get someone to help you, you should let us know. If you hire someone, we must approve the fee before he or she can collect it. And if you hire a lawyer, we will withhold up to 25 percent of any past due benefits to pay toward the fee.

If you have any questions, you may call us toll-free at 1-800-772-1213, or call your local Social Security office at 1-203-365-8457. We can answer most questions over the phone. You can also write or visit any Social Security office. The office that serves your area is located at:

DISTRICT OFF DOWNTOWN
3RD FLOOR
3885 MAIN STREET
BRIDGEPORT, CT 06606

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES
UNION AND INDUSTRY PENSION FUND

1750 NEW YORK AVE., N.W., SUITE 501 UNITED UNIONS BUILDING, WASHINGTON, D.C. 20006-5387
PHONE 202-783-4884 FAX NUMBER 202-393-6475



September 20, 1993

Mr. Paul Tsimbidaros
72 Whittier Street
Bridgeport, CT 06605

Applicant No. 19,928

Dear Mr. Tsimbidaros:

On behalf of the Trustees of the International Brotherhood of Painters and Allied Trades Union and Industry Pension Fund, we are pleased to inform you that your application for a pension has been considered, and that you are entitled to a single life pension amount of $421.50 under the Disability Pension, effective January 1, 1992.

However, you elected that benefits be paid under the terms of the Husband-and-Wife Pension. The attached election form sets out the two payment forms under which this benefit can be paid.

To begin receiving your monthly pension, you must sign and return the following:

1) Husband-and-Wife Payment Election Form - Place a check mark in the box provided, designating the payment option under which benefits are to be paid.

2) Retirement Declaration - Sign one copy and return it to the Fund and the other copy you should keep for future reference.

3) Pensioner's Signature Card - Sign this card exactly as you intend to endorse each pension check.

Return all three items in the self-addressed envelope provided.

Remember, you must personally sign each of your pension checks, and be sure to notify the Fund Office, in writing, of any change in address or if you return to employment.

**** NOTE - Any employment after the above date will not be counted for purposes of re-determining your pension amount. However, if you have had employment after the above date and you do wish those hours to be taken into consideration, please notify this office immediately. ONCE YOUR PENSION CHECKS HAVE BEGUN, YOUR PENSION AMOUNT CANNOT BE RE-DETERMINED.****

We join with the Trustees in extending our best wishes to you during your retirement years ahead.

Sincerely yours,

GARY J. MEYERS
Administrator

GJM:llm
opeiu #2
afl-cio

Enclosures